UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

PIONEER CAPITAL CORPORATION, d/b/a PIONEER PRIVATE CAPITAL,	)	
Plaintiff	)	
v.	)	***Civil No. 02-217-P-C***
ENVIRONAMICS CORPORATION,	)	
Defendant	)	
and	)	
GOULDS PUMPS, INCORPORATED,	)	
Party-in-Interest	)	

RECOMMENDED DECISION ON DEFENDANT'S MOTION TO DISMISS AND PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER

Defendant Environamics Corporation ("Environamics") moves pursuant to Federal Rules of Civil Procedure 12(b)(2) and 19 to dismiss the instant suit, filed by lender Pioneer Capital Corporation, d/b/a Pioneer Private Capital ("Pioneer"), for lack of personal jurisdiction or failure to join necessary and indispensable parties or, alternatively, to stay it pending final disposition of a related New Hampshire state-court action. Defendant Environamics Corporation's Motion To Dismiss Plaintiff's Complaint, or, in the Alternative, To Stay Proceedings, etc. ("Motion To Dismiss") (Docket No. 11) at 1. For its part, Pioneer moves pursuant to Federal Rules of Civil Procedure 7 and 66 for appointment of a receiver *pendente lite* of Environamics' assets. Plaintiff's Motion for

Appointment of Receiver, etc. ("Motion for Receiver") (Docket No. 2) at 1.[1] For the reasons that follow, I recommend that Environamics' motion to dismiss or stay be denied and Pioneer's motion for appointment of a receiver be granted.

I. Motion To Dismiss

A. Personal Jurisdiction

In this diversity-jurisdiction action, Pioneer seeks to collect monies allegedly due and owing pursuant to a promissory note ("Note") executed in its favor by Environamics on or about August 1, 2001. Complaint (Docket No. 1) ¶¶ 4, 8, 14-18.[2] Contemporaneously with executing the Note, Environamics also executed an amended and restated loan agreement ("Loan Agreement") and an amended and restated security agreement ("Security Agreement") (any or all three, "Loan Documents"). Second Affidavit of Scott P. Lalumiere ("Second Lalumiere Aff.") (Docket No. 16) ¶ 13; *see also* Note, Exh. 1 thereto; Loan Agreement, Exh. 2 thereto; Security Agreement, Exh. 3 thereto. In addition, Robert Rockwood, Environamics' president and chief executive officer, and Roxana Marchosky, its general counsel and a director, each executed an amended and restated guaranty ("Rockwood Guaranty" and "Marchosky Guaranty") (together, "Guaranties") guaranteeing payment of Environamics' obligations. Second Lalumiere Aff. ¶¶ 5, 7, 14; *see also* Rockwood Guaranty, Exh. 4 thereto; Marchosky Guaranty, Exh. 5 thereto.

[1] In the concluding section of its opposition to the Motion To Dismiss, Pioneer also requests costs incurred in defending against that motion, which it characterizes as "frivolous." *See* Plaintiff's Opposition to Defendant Environamics Corporation's Motion To Dismiss Plaintiff's Complaint, or, in the Alternative, To Stay Proceedings, etc. ("Dismiss Opposition") (Docket No. 15) at 16. This is tantamount to a request for sanctions pursuant to Federal Rule of Civil Procedure 11. As Rule 11(c)(1)(A) makes clear on its face, sanctions under that rule may only be sought by the procedure therein specified. The melding of a request for sanctions into an opposition to a motion to dismiss is not appropriate.

[2] Pioneer also seeks to collect the monies it alleges are due and owing on alternative theories of unjust enrichment and monies lent. Complaint ¶¶ 19-27.

In or about November 2002 (subsequent to commencing the instant action), Pioneer sued Rockwood and Marchosky, but not Environamics, in the New Hampshire Superior Court (Rockingham County), seeking to collect on the Rockwood and Marchosky guaranties. *See* Exh. A to Motion To Dismiss.

Environamics, a Delaware corporation with a principal place of business in Hudson, New Hampshire, *see* Affidavit of Allen E. LeBoeuf ("LeBoeuf Aff.") (Docket No. 12) ¶ 1, posits as an initial matter that it has insufficient contacts with the state of Maine to permit the exercise of personal jurisdiction over it consistent with its due-process rights, *see* Motion To Dismiss at 4-10.[3] However, as Environamics acknowledges, the Loan Documents contain what it terms a "forum-selection clause." Motion To Dismiss at 9. More precisely, the Loan Agreement provides in relevant part:

> 19. Consent to Jurisdiction. Borrower [Environamics] hereby irrevocably and unconditionally (a) submits to personal jurisdiction in the State of Maine over any suit, action or proceeding arising out of or relating to this Agreement, and (b) waives any and all personal rights under the laws of any state to object to jurisdiction within the State of Maine or venue in any particular forum within the State of Maine.

Loan Agreement ¶ 19. And the Security Agreement provides in relevant part:

> (o) Debtor [Environamics] hereby irrevocably and unconditionally (a) submits to personal jurisdiction in the State of Maine or the State of New Hampshire over any suit, action or proceeding arising out of or relating to this Agreement, and (b) waives any and all personal rights under the laws of any state to object to jurisdiction within the State of Maine or the State of New Hampshire or venue in any particular forum within the State of Maine or the State of New Hampshire.

Security Agreement ¶ 6(o).

These provisions alter the nature of personal-jurisdiction analysis. As Environamics recognizes, clauses such as this are "*prima facie* valid," although they may be invalidated to the extent

[3] Environamics manufactures industrial centrifugal pumps and sealing devices. LeBoeuf Aff. ¶ 2. Its products are purchased by (*continued on next page*)

their enforcement would be "unreasonable under the circumstances." Motion To Dismiss at 9 (quoting *Silva v. Encyclopedia Britannica Inc*., 239 F.3d 385, 386 (1st Cir. 2001)).

Environamics argues that enforcement of these clauses would be unreasonable inasmuch as (i) it has no contacts with Maine, (ii) Pioneer has commenced a virtually identical lawsuit against Environamics' principals in New Hampshire, (iii) there is as a result a real potential for the issuance of inconsistent judgments, (iv) Environamics has not purposefully availed itself of the privilege of doing business in Maine, (v) Pioneer's claims do not arise from any activities that occurred in Maine but rather from alleged breach of the Note and Loan Agreement in New Hampshire, (vi) all of the property and assets necessary to satisfy any judgment Pioneer may recover in either action are located in New Hampshire and (vii) Pioneer seeks the additional remedy of appointment of a receiver over a New Hampshire corporation. *See id*. at 9-10. It adduces evidence that (i) it has no sales or marketing office, registered agent or distributor in Maine, (ii) does not directly market any of its products here and (iii) neither owns real property nor maintains commercial banking accounts here. *See* LeBoeuf Aff. ¶¶ 6-10.

These arguments either miss the mark or overplay Environamics' hand. Pioneer, a Maine corporation that at all relevant times did business with Environamics from its office in Portland, Maine, demonstrates that the parties' course of dealing entailed numerous contacts with Maine, including a visit from Rockwood to Pioneer's Portland office, Rockwood's attendance at a loan-closing in Portland, Rockwood's and Marchosky's attendance at regular meetings, many of which were held in Portland, and regular communications to or from Portland by phone, fax and mail. *See* Second Lalumiere Aff. ¶¶ 6-8, 17-18. In addition, Marchosky, an attorney, acted as Environamics'

customers who process toxins, carcinogens, caustics, acids, explosives and flammable chemicals. *Id*.

counsel throughout discussions and negotiations surrounding the Loan Documents and the Guaranties and represented that she reviewed the documents prior to the closing. *Id.* ¶ 16.

In *Silva*, the First Circuit held a forum-selection clause enforceable even though it was contained in a "boilerplate" provision printed on the reverse side of a contract presented by a party with alleged "overwhelming bargaining power and influence." *Silva*, 239 F.3d at 389. Environamics is even less a sympathetic candidate for reprieve than Silva. From all that appears, Environamics knowingly consented to this court's personal jurisdiction (and agreed not to contest such jurisdiction) as part of an arm's-length commercial transaction with respect to which it was represented by counsel. Given the nexus between the parties' course of dealings and Maine, there is nothing whatsoever troubling or unreasonable about enforcing the provisions in question. *See Silva*, 239 F.3d at 389 ("All that remains, then, is an arms-length transaction, the terms of which are binding on both parties. As such, the enforcement of those terms is not unreasonable[.]").

Environamics' motion to dismiss for lack of personal jurisdiction accordingly should be denied.

B. Failure To Join Necessary and Indispensable Parties

Environamics next posits that (i) Rockwood and Marchosky (in their capacities as guarantors and as principals of the corporation) are both necessary and indispensable parties to the instant action pursuant to Federal Rule of Civil Procedure 19, (ii) they cannot be joined inasmuch as this court lacks personal jurisdiction over them, and (iii) as a result, the instant action must be dismissed. *See* Motion To Dismiss at 10-17. This argument again falls short.

The Guaranties provide, in relevant part:

> 1.4 Independent Obligations. Guarantor agrees that it is directly and primarily liable to Lender, that its obligations hereunder are independent of the Guarantied Obligations, and that a separate action or actions may be brought and

> prosecuted against Guarantor, whether action is brought against Borrower or whether Borrower is joined in any such action or actions. . . .
>
> ***
>
> 15. Consent to Jurisdiction; Waivers. GUARANTOR HEREBY IRREVOCABLY AND UNCONDITIONALLY (A) SUBMITS TO PERSONAL JURISDICTION IN THE STATE OF MAINE OVER ANY SUIT, ACTION OR PROCEEDING ARISING OUT OF OR RELATING TO THIS GUARANTY, AND (B) WAIVES ANY AND ALL PERSONAL RIGHTS UNDER THE LAWS OF ANY STATE . . . (II) TO OBJECT TO JURISDICTION WITHIN THE STATE OF MAINE OR VENUE IN ANY PARTICULAR FORUM WITHIN THE STATE OF MAINE . . . .

Rockwood Guaranty §§ 1.4, 15; Marchosky Guaranty §§ 1.4, 15.

Environamics' arguments notwithstanding, guarantors such as Rockwood and Marchosky are not necessary and indispensable parties to an action against the principal debtor. *See, e.g., Goldman, Antonetti, Ferraiuoli, Axtmayer & Hertell v. Medfit Int'l, Inc*., 982 F.2d 686, 691 (1st Cir. 1993) ("The district court ruled that because defendants and the non-diverse MPPR were alleged to be jointly and severally liable for the legal fees owed plaintiff, joinder of MPPR was not mandatory, but was merely permissive. The district court's ruling on this issue is patently correct."); *U.S.I. Props. Corp. v. M.D. Constr. Co.*, 860 F.2d 1, 7 (1st Cir. 1988) (inasmuch as, under Puerto Rico law, plaintiff could choose to sue guarantor, debtor or both, guarantor was not indispensable party for purposes of Rule 19); *compare, e.g., Acton Co. of Mass. v. Bachman Foods, Inc*., 668 F.2d 76, 82 n.3 (1st Cir. 1982) (noting, in response to argument that "a mere guarantor is not an indispensable party," that "Acton's interest under the terms of the agreement, to which it was a party, was more than that of a mere guarantor").

Nor are directors or officers of corporations generally considered necessary and indispensable parties to a suit against the corporation. *See, e.g., Castner v. First Na'l Bank of Anchorage*, 278 F.2d 376, 384 (9th Cir. 1960) ("Directors are generally not necessary or indispensable parties to an action

by or on behalf of the corporation they control."); *CRTF Corp. v. Federated Dep't Stores, Inc.*, 683 F. Supp. 422, 426 (S.D.N.Y. 1988) (directors and officers of corporation usually not regarded as indispensable parties to actions involving corporation unless individually accused of wrongdoing).

In any event, even assuming *arguendo* that Rockwood and Marchosky are indispensable parties, they have expressly consented to personal jurisdiction in this state. There is no evidence that their consent was obtained by fraud or overreaching and no reason to believe its enforcement would be unreasonable or unfair under the circumstances. *See Silva*, 239 F.3d at 388-89. Hence, even were they indispensable parties, this action would not have to be dismissed for inability to join them arising from lack of personal jurisdiction over them.

For these reasons, Environics' motion to dismiss on the ground of failure to join necessary and indispensable parties should be denied.

C. Request To Stay Action

Environamics finally requests, as an alternative to dismissal, that the court invoke its inherent power "to stay pending litigation when the efficacious management of court dockets reasonably requires such intervention." Motion To Dismiss at 17 (quoting *Marquis v. FDIC*, 965 F.2d 1148, 1154-55 (1st Cir. 1992)). Environamics states that it would then move to intervene in the pending New Hampshire action, permitting that court to adjudicate Envrionamics' alleged breach of the Note and Loan Agreement as well as Rockwood's and Marchosky's purported obligations under the Guaranties. *See id*. Environamics envisions that, upon final determination by the New Hampshire court, this action would proceed. *See id*. In essence, Environamics seeks a stay that would be tantamount to a dismissal. *See, e.g., Nowaczyk v. Warden, N.H. State Prison*, 299 F.3d 69, 81 n.8 (1st Cir. 2002) ("We recognize that, in certain circumstances, a stay is as much a refusal to exercise federal jurisdiction as a dismissal. That is so, for example, when the district court enters a stay under

the *Colorado River* doctrine on the ground that parallel state-court litigation will be an adequate vehicle for the complete and prompt resolution of the issues between the parties.") (citations and internal quotation marks omitted).

Tellingly, Environamics invokes the court's "inherent" power rather than the so-called *Colorado River* doctrine. Environamics may well have surmised (correctly) that the instant action and the pending New Hampshire action – which involve different defendants and different agreements – do not qualify as "parallel" for purposes of *Colorado River*. *See, e.g.*, *Britton v. Britton*, 223 F. Supp.2d 276, 283 (D. Me. 2002) ("Suits are parallel where substantially the same parties litigate substantially the same issues in the state and federal forums."); *Harris Trust & Sav. Bank v. Olsen*, 745 F. Supp. 503, 507-08 (N.D. Ill. 1990) (plaintiff's state-court suit against two of three guarantors independently liable for repayment of same note not "parallel" to plaintiff's federal-court suit against remaining guarantor).

Even had Environamics been able to make the case that the instant action and the New Hampshire action were "parallel," the issuance of a stay would not have been a foregone conclusion. "There must be some extraordinary circumstances for a federal court to shrink from the virtually unflagging obligation of the federal courts to exercise the jurisdiction given them." *Currie v. Group Ins. Comm'n*, 290 F.3d 1, 10 (1st Cir. 2002) (laying out parameters of *Colorado River* doctrine) (citation and internal quotation marks omitted).

Environamics, which does not even argue that it qualifies for *Colorado River* consideration and which executed documentation acknowledging Pioneer's right to pursue remedies against it and the guarantors "either jointly or severally," Loan Agreement §§ 8, 15, makes out too weak a case to overcome what the First Circuit has termed the "heavy presumption favoring the exercise of

jurisdiction." *Currie*, 290 F.3d at 10 (citation and internal quotation marks omitted). Its request to stay the instant action accordingly should be denied.

II. Motion To Appoint Receiver

In the event the court agrees that the motion to dismiss should be denied, I recommend for the reasons that follow that it grant Pioneer's motion for appointment of a receiver.

A. Factual Context

Pioneer offers the following evidence relevant to this portion of my recommended decision:

Lalumiere is president of Pioneer and was involved in the making of the loan to Environamics. Affidavit of Scott P. Lalumiere ("First Lalumiere Aff.") (Docket No. 5) ¶ 2.

On or about August 1, 2001 Pioneer and Environamics entered the Loan Agreement. *Id*. ¶ 4; Loan Agreement, Exh A thereto. Pursuant to the Loan Agreement, on or about August 1, 2001 Environamics executed and delivered to Pioneer the Note in the principal amount of $1,187,839.23, payable with interest thereon on October 15, 2001. First Lalumiere Aff. ¶ 5; Note, Exh. B thereto. On or about August 1, 2001, to secure the indebtedness under the Note and Loan Agreement, Environamics executed and delivered to Pioneer the Security Agreement, granting it a security interest in all, or substantially all, of Environamics' assets. First Lalumiere Aff. ¶ 6; Security Agreement, Exh. C thereto.

The Loan Agreement provides, in relevant part:

> 7. Default. Each and all of the following events shall constitute "Events of Default" and, after the giving of any required notice or the expiration of any applicable grace or cure period, shall each and all constitute a "Default": (i) Borrower shall fail to pay any amount when due under the Note . . . .
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> ***
>
> 9. Waiver and Exercise of Rights. No failure or neglect of the Lender to exercise or enforce any of its rights, powers or privileges under this Agreement or the Loan Documents shall operate as a waiver thereof; nor shall any partial or single exercise or waiver thereof preclude any other or further exercise thereof or the excise [sic] of any other right, power or privilege; nor shall the Lender's waiver or refusal or

failure to waive any such rights, powers or privileges create any rights of action against the Lender by the Borrower.

10. No Oral Modification. This Agreement and each and all of the provisions hereof cannot be altered, modified, amended, waived, extended, changed, discharged, or terminated orally or by any act of Lender or Borrower, but only by an agreement in writing signed by the party against whom enforcement of any alteration, modification, amendment, waiver, extension, change, discharge or termination is sought. . . .

Loan Agreement §§ 7, 9-10. The Note provides, in relevant part:

. . . On October 15, 2001, all principal, accrued but unpaid interest and all other amounts due under this Note shall be due and payable in full.

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In the event that any or all of the following shall occur (each, a "Default"): (i) Maker shall fail to pay any amount when due hereunder; . . . (iii) there shall occur a default in the terms or conditions of any other instrument(s) or document(s) executed in connection herewith or which may from time to time be given as additional security herefor and such default shall continue after the period, if any, set forth in such instrument(s) or document(s) for the purpose of curing such default, then, in each and every such case, Lender shall have the option to declare due and payable at once the entire principal balance hereof together with accrued interest . . . .

***

No delay or omission on the part of Lender in exercising any right hereunder shall operate as a waiver of such right or of any other right under this Note. No waiver of any right of Lender or any modification of the terms and conditions of this Note shall be effective unless set forth in writing and signed by Lender. Further, no forbearance or waiver by Lender on one occasion shall be construed as a waiver of any right of Lender on any future occasion.

Note at 1, 3. The Security Agreement provides, in relevant part:

1. Definitions. The following terms shall have the meanings set forth below:

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"Event of Default" or "Default" shall mean the occurrence of any one or more of the following events:

***

(ii) Debtor shall fail to observe or perform any covenant or agreement contained in this Agreement or in any other Obligation, and such failure shall continue beyond applicable grace or cure periods, if any;

***

5. Secured Party's Rights And Remedies.

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(g) In addition to any other rights or remedies of the Secured Party set forth herein or in the other Loan Documents, upon the occurrence of a Default, but subject to the provisions of the [New Hampshire Uniform Commercial] Code or other applicable law, the Secured Party shall have the right and power to take possession of all or any part of the Collateral, and to exclude the Debtor and all persons claiming under the Debtor wholly or partly therefrom, and thereafter to hold, store, and/or use, operate, manage and control the same. . . . Without limiting the generality of the foregoing, the Secured Party shall have the right to have a receiver appointed by a court of competent jurisdiction in any action taken by the Secured Party to enforce its rights and remedies hereunder in order to manage, protect and preserve the Collateral and continue the operation of the Debtor's business and to collect all revenues and profits thereof and apply the same to the payment of all expenses and other charges of such receivership including the compensation of the receiver and to the payment of the Obligations as aforesaid until a sale or other disposition of such Collateral shall be finally made and consummated. Debtor acknowledges and agrees that Secured Party's said right to appointment of a receiver is a bargained-for contractual remedy, and is not intended to be circumscribed by principles of equity.

6. General Provisions.

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(c) This Agreement and each and all of the provisions hereof cannot be altered, modified, amended, waived, extended, changed, discharged, or terminated orally or by any act of Debtor or Secured Party, but only by an agreement in writing signed by the party against whom enforcement of any alteration, modification, amendment, waiver, extension, change, discharge or termination is sought. Without limiting the foregoing, no waiver by Secured Party of any default shall be effective unless in writing. Secured Party's acceptance of a partial or late payment or the failure of Secured Party to exercise a right or remedy available to it is not a waiver of any other or future obligation of Debtor or right of Secured Party. No such act or omission on the part of Secured Party shall constitute a modification of this Agreement, nor a waiver of any other default which may occur at a later date.

Security Agreement §§ 1, 5-6.

On or about August 7, 2002 Pioneer made demand for Environamics to cure all defaults and for immediate payment in full of all amounts due under the Note and Loan Agreement. First Lalumiere Aff. ¶ 8. As of August 7, 2002 indebtedness under the Note, which indebtedness was secured by the Security Agreement, was as follows: principal of $1,207,839.23 and interest of $292,610.43 as of July 31, 2002, with interest continuing to accrue at the rate of $739.94 per day, plus costs, late charges and attorneys' fees. *Id*. ¶ 9. All agreements, if any, by Pioneer to forbear from taking action against Environamics to allow it to obtain refinancing or new investors have expired. *Id*. ¶ 13.

Environamics offers the following evidence (beyond that set forth above) relevant to this portion of my recommended decision:

Rockwood is president of Environamics. Affidavit of Robert E. Rockwood ("Rockwood Aff.") (Docket No. 9) ¶ 1. Environamics, located in Hudson, New Hampshire, is a small manufacturer of industrial centrifugal pumps and sealing devices. *Id*. Its products are highly engineered and are purchased by customers who process toxins, carcinogens, caustics, acids, explosives and flammable chemicals. *Id*. ¶ 2.

Environamics and Pioneer entered into various loan agreements on various dates, including June 29, 2000, January 24, 2001, June 6, 2001 and August 1, 2001. *Id*. ¶ 10. The August 1, 2001 agreements are the subject of this action. *Id*. On or about June 2000, Pioneer made a loan to Environamics. *Id*. ¶ 4. On or about January/February 2001, and at other times thereafter, payment terms and payments on the June 2000 loan to Pioneer from Environamics were changed by agreement of the parties, through Rockwood and Lalumiere. *Id*. ¶ 6.

On or about June 2002 Pioneer, by its president, Lalumiere, agreed to an extension of time for Environamics until the end of September 2002 to allow Environamics the opportunity to provide to

Pioneer evidence of financing for the corporation. *Id*. ¶ 17. Pioneer agreed that upon providing such evidence, Environamics would have additional time under the Note and Loan Agreement to close on such financing without defaulting on the Note and Loan Agreement. *Id*.

On August 10, 2002 Rockwood spoke to Lalumiere, who confirmed that Environamics had an extension of time until the end of September to provide Pioneer with evidence of additional funding. *Id*. ¶ 28. Lalumiere informed Rockwood that the other investors of Pioneer were very confrontational with him about the extension Pioneer had granted and wanted to eliminate it altogether, but that he would honor it. *Id*.

On or about September 30, 2002 and October 1, 2002 Environamics provided Pioneer with evidence of funding of the corporation and, therefore, under the parties' agreement, Environamics was granted additional time under the Note and Loan Agreement to proceed to closing on the additional funding. *Id*. ¶ 18.

Within a few days of confirmation of the extension, and while Environamics was negotiating terms with new refinancing investors, Pioneer began demanding of Environamics, and directly of one of Environamics' refinancing investors, through a series of high-pressure communications, to know immediately the closing dates for Environamics' new refinancing and to demand immediate payoff of the debt to Pioneer, even before Environamics had completed and closed those refinancing arrangements. *Id*. ¶ 20. These demands made negotiations with this investor extremely difficult and eventually caused the derailment and demise of this investment. *Id*. ¶ 22.

Pioneer is not likely to recover on the underlying action as a result of damages it has caused to Environamics, including the derailment of previous financing, delaying of new financing and publication of false information, all resulting in delays in Environamics' growth of sales, damage to

customer base and business relationships and substantial damages giving rise to counterclaims, defenses and setoffs. *Id*. ¶ 48.

Contrary to Pioneer's current claim that the Loan Agreement and Note have been in default since October 2001, Pioneer took no steps and no actions during any of that time to collect on those obligations, even though it now claims Environamics' assets are being wasted and depreciated. *Id*. ¶ 41. Pioneer does not contest that it granted similar oral and written extensions for the loan repayment from January 2001 through October 2001, and indeed provided additional funding past the original due date for payment of the first loan. *Id*.

Lalumiere advised Rockwood that one of Pioneer's investors made a statement to the effect that he "was willing to shoot himself in the foot, and not get anything, as long as he could shoot them [Environamics] in the head." *Id*. ¶ 39. Pioneer, through Lalumiere and its agent James Jewell, has stated to Rockwood on at least two separate occasions that its intent, upon the appointment of its selected receiver, is to terminate most of the employees within a couple of days and liquidate the company, just to get its money immediately. *Id*. ¶ 40. The receiver selected by Pioneer has no background, engineering skills or knowledge or experience whatsoever in Environamics' industry, which would be further detrimental to Environamics' operations and ongoing business and evidences Pioneer's intent regarding Environamics. *Id*. ¶ 52.

B. Analysis

Pioneer invokes Federal Rule of Civil Procedure 66 in seeking appointment of a receiver *pendente lite* of Environamics' assets. *See* Motion for Receiver at 1. Rule 66 provides in relevant part:

> . . . The practice in the administration of estates by receivers or by other similar officers appointed by the court shall be in accordance with the practice heretofore followed in the courts of the United States or as provided in rules

> promulgated by the district courts. In all other respects the action in which the appointment of a receiver is sought or which is brought by or against a receiver is governed by these rules.[4]

"[R]eceiverships are and have for years been a familiar equitable mechanism." *Morgan v. McDonough*, 540 F.2d 527, 533 (1st Cir. 1976). A federal court "has inherent power to appoint [a] receiver to manage [a] defendant's assets pending litigation." *United States v. Quintana-Aguayo*, 235 F.3d 682, 686 n.8 (1st Cir. 2000). As Environamics notes, see Defendant's, Environamics Corporation, Objection to Plaintiff's Motion for Appointment of Receiver ("Receiver Opposition") (Docket No. 8) at 5, factors typically considered in determining whether to appoint a receiver include "fraudulent conduct on the part of defendant; the imminent danger of the property being lost, concealed, injured, diminished in value, or squandered; the inadequacy of the available legal remedies; the probability that harm to plaintiff by denial of the appointment would be greater than the injury to the parties opposing appointment; and, in more general terms, plaintiff's probable success in the action and the possibility of irreparable injury to his interests in the property," 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice & Procedure* ("*Federal Practice & Procedure*") § 2983, at 24-29 (1997) (footnotes omitted).

However, in this case Pioneer grounds its request for appointment of a receiver primarily on section 5(g) of the Security Agreement. *See* Motion for Receiver at 5; Plaintiff's Reply Memorandum in Support of Its Motion for Appointment of Receiver ("Receiver Reply") (Docket No. 13) at 1-2. In section 5(g), the parties expressly agreed that in the event of default Pioneer would "have the right to have a receiver appointed by a court of competent jurisdiction," and Environamics "acknowledge[d]

[4] This district has no local rules governing appointment of receivers.

and agree[d] that [Pioneer's] said right to appointment of a receiver is a bargained-for contractual remedy, and is not intended to be circumscribed by principles of equity." Security Agreement § 5(g).

As Pioneer observes, *see* Receiver Reply at 1-2, the First Circuit has suggested that the existence of an express contractual right to appointment of a receiver, coupled with "adequate prima facie evidence of a default," can be sufficient to warrant such an appointment, *Garden Homes, Inc. v. United States*, 207 F.2d 459, 459-60 (1st Cir. 1953). Given Environamics' clear acknowledgement – in the context of an arms' length commercial transaction – that Pioneer's right to appointment of a receiver was intended to be unfettered by consideration of equitable principles, this approach seems to me the right one in this case.

The question remains whether Pioneer has adduced adequate *prima facie* evidence of a default. I find that it has. Pursuant to the terms of the Note, payment in full was due October 15, 2001. It is undisputed that this payment has not been made. Environamics points out that (i) the Loan Documents define a "default" as occurring after the expiration of any applicable grace or cure period, and (ii) the parties negotiated various grace periods, during which Pioneer refrained from exercising any rights or remedies, to enable Environamics to secure replacement financing. *See* Receiver Opposition at 8-9. However, the Loan Documents unambiguously (i) require that modifications, to be enforceable, be set forth in a writing signed by the party against whom their enforcement is sought and (ii) provide that forbearance on the part of Pioneer does not constitute a waiver of any of its rights or remedies. There is no evidence that Pioneer signed any document providing for the stretchout of repayment beyond October 2001. Therefore, oral agreements of the parties and forbearance by Pioneer notwithstanding, Pioneer makes out an adequate *prima facie* showing that Environamics has been in default since October 16, 2001. *See Diversified Foods, Inc. v. First Nat'l Bank of Boston*, 605 A.2d 609, 613 (Me. 1992) (in absence of ambiguity of contractual terms, parties' course of

dealing did not alter contract that provided that modifications had to be in writing and that banks' inaction did not waive default).[5]

Accordingly, I recommend that a receiver be appointed *pendente lite*.

C. Particulars of Receivership Appointment

"The receiver is considered to be an officer of the court, and therefore not an agent of the parties, whose appointment is incident to other proceedings in which some form of primary relief is sought." 12 *Federal Practice & Procedure* § 2981, at 9-10 (footnotes omitted).

In its motion papers Pioneer – which identifies no contractual right to appointment of the receiver of its choice – requested that the court appoint Mark Stickney, a certified public accountant who is president of Spinglass Management Group, or some other person or entity, as receiver. *See* Motion for Receiver at 1, 7-9; Affidavit of Mark F. Stickney (Docket No. 4) ¶ 2. Through the Rockwood affidavit, Environamics protested this appointment, asserting that Stickney was unqualified.

Against this backdrop, on February 13, 2003 I held a conference with counsel to advise them of the conclusions to be reflected in this recommended decision and to solicit the parties' views as to the suitability of the appointment of Stickney, Steven Thing, C.P.A. (whose name I raised) or any other individual whom either party might wish to propose. *See* Report of Conference of Counsel and Order ("2/13 Conference Report") (Docket No. 18). Finally, I requested comment from counsel for Environamics as to the scope of receivership powers Pioneer had proposed, which is as follows:

> a) To manage, operate, protect and preserve the assets and property owned by Environamics, to continue the operation of Environamics, and to collect all revenues and profits from such operations and apply the same to the payment of all expenses and other charges of such receivership, including the compensation of the

[5] The Note and the Loan Agreement state that they are to be construed in accordance with Maine law, *see* Note at 4; Loan Agreement § 12, while the Security Agreement states that it is to be construed in accordance with New Hampshire law, *see* Security Agreement § 6(m).

Receiver, and to the payment of Environamics' obligations to Pioneer until a foreclosure sale or other disposition of such Collateral shall be finally made;

b) To examine and, as necessary, make copies of the records and accounts of Environamics relating to the management of Environamics and report to the Court on the same during the pendency of this action;

c) To apply the revenues and profits received from the management and operation of Environamics in the following manner:

i. Payment of the ordinary and necessary expenses of operating the business, including without limitation, the payment of taxes, materials, supplies, utilities, payroll, insurance premiums and other necessary operating expenses;

ii. Payment of the costs, expenses and fees of the Receiver and agents of the Receiver; and

iii. Payment of principal and interest and other sums owing to Pioneer on its Note;

d) To collect the revenues, profits, accounts receivable and all other obligations owing to Environamics, to bring action, if necessary, in order to collect the same, and to settle and compromise any of such accounts receivable, debts or obligations whenever the Receiver shall deem it advisable to do so, upon such terms and conditions as appear to the Receiver to be justifiable;

e) To operate the business as a going concern and, in connection therewith, negotiate and enter into contracts, to renegotiate and terminate contracts, to sell goods, hire and fire employees and do all things Environamics could or would do in the ordinary course of operating its business, and to compromise obligations where it appears in the Receiver's best judgment to be in the best interest of preserving the assets and property of Environamics entrusted to the Receiver;

f) To enter into contracts, incur and discharge obligations and make expenditures from the available income and receipts of Environamics for labor, insurance, equipment, inventory and supplies currently required and to pay routine operating expenses of all types;

g) To pay the agents and employees whom the Receiver hires or continues in employment such compensation for their services as the Receiver deems to be proper;

h) To employ an attorney if, in the judgment of the Receiver, legal advice, counsel, or consultation is required in connection with the performance of the duties of

> the Receiver, and to prosecute actions to collect any sums or obligations due as appears advisable;
>
> i) To expend reasonable sums in the repair and maintenance of the assets and property of Environamics in the possession of the Receiver which expenditures, in the best judgment of the Receiver, are necessary to preserve and maintain such property pending the outcome of this litigation; and
>
> j) To do anything the Receiver reasonably deems necessary to perform the duties set forth above.

Motion for Receiver at 7-9.

In order to give counsel an opportunity to confer with their respective clients concerning these matters before responding, the conference was continued to the following day. *See* 2/13 Conference Report. At the followup conference with counsel held February 14, 2003, I obtained the parties' views. *See* Report of Conference of Counsel and Order (Docket No. 19). With the caveat that Environamics continues to press its motion to dismiss and its objection to appointment of a receiver, the parties agreed that, should the court concur with my recommendation that a receiver be appointed, Steven Thing, C.P.A. (whom I have confirmed is available and willing to serve as receiver in this matter) is a qualified and appropriate choice. *See id*.

On the issue of scope of the receiver's authority, counsel for Pioneer took the position that inasmuch as Environamics has at no time in its motion papers objected in any respect to Pioneer's proposed scope of receiver duties, it should not be heard to do so now. *See id*. Counsel for Environamics stated that he would seek to reach agreement with counsel for Pioneer as to scope of duties, but that if the parties fail to agree Environamics should be permitted to be heard. *See id*. I informed counsel that, to the extent there remains any issue concerning scope of the receiver's authority, it should be fully articulated within any opposition filed to the instant recommended decision

so that, if the district judge decides to appoint a receiver, he will not be delayed in so doing because of any outstanding issues regarding the scope of the receiver's duties. *See id*.

III. Conclusion

For the foregoing reasons, I recommend that the court **DENY** Environamics' motion to dismiss or stay the instant action and **GRANT** Pioneer's motion for appointment of a receiver *pendente lite*. Should the court agree with the foregoing recommendations, I further recommend that it appoint Steven Thing, C.P.A., as receiver, with powers and authority to be determined by the district judge.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this 14th day of February, 2003.

_____
David M. Cohen
United States Magistrate Judge

U.S. District Court
District of Maine (Portland)
CIVIL DOCKET FOR CASE #: 2:02-cv-00217-GC
Internal Use Only

PIONEER CAPITAL CORP v. ENVIRONAMICS CORP, et al
Assigned to: JUDGE GENE CARTER
Referred to:
Demand: $1208000

Date Filed: 10/24/02
Jury Demand: None
Nature of Suit: 190 Contract: Other
Jurisdiction: Diversity

Lead Docket: None
Related Cases: None
Case in other court: None
Cause: 28:1332 Diversity-Breach of Contract

Plaintiff

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